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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 299

CHARLES F. HEMANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 101–120) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 28, 1947 (R. 100). The petition for a writ of certiorari was filed August 25, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

Petitioner was a witness before a so-called one-man grand jury in Michigan which was investigating illegal tampering with the state legislature. A warrant was issued by the grand jury for the arrest of the alleged conspirators, and arrangements were made for their preliminary examination before a state judge to determine whether they should be held for trial. Petitioner was advised that he would be needed as a witness at that preliminary hearing, but he left Michigan to avoid having to testify. Thereafter, he was indicted and convicted under the fugitive witness provision of the federal Fugitive Felon Act.

The questions raised by the petition are:

1. Whether the fugitive witness provision of the Fugitive Felon Act is unconstitutional on the grounds that—

a. Congress lacked power to enact such a statute;

b. The statute is indefinite and uncertain, and improperly incorporates state criminal laws which are indefinite and uncertain;

c. The statute contravenes the constitutional right of a person to move freely among the states.

2. Whether an offense was committed under the fugitive witness provision in that—

a. No "criminal proceeding," within the meaning of the statute, was pending in Michigan when petitioner left;

b. No felony, within the scope of the general common law, was charged in the Michigan proceeding;

c. Even under Michigan law no felony was charged.

STATUTE INVOLVED

The so-called Fugitive Felon Act of May 18, 1934, c. 302, 48 Stat. 782, 18 U. S. C. 408e, provides:

> It shall be unlawful for any person to move or travel in interstate or foreign commerce from any State, Territory, or possession of the United States, or the District of Columbia, with intent either (1) to avoid prosecution for murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing, under the laws of the place from which he flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged. Any person who violates the provision of this Act shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not longer than five years, or by both such fine and imprisonment. Violations of this Act may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed.

STATEMENT

On September 16, 1946, a one-count indictment was returned in the District Court for the Eastern District of Michigan, charging that on or about August 28, 1946, petitioner violated the Fugitive Felon Act in that he moved and travelled in interstate commerce from Ingham County, Michigan, to Washington, D. C., with intent to avoid giving testimony in a certain criminal proceeding then pending in the Ingham County Circuit Court in which the commission of a felony was charged (R. 1–2).

Petitioner's motion to dismiss the indictment on the grounds that it failed to state an offense and that the statute was unconstitutional (R. 4) was denied (R. 5). After a jury trial, petitioner was found guilty (R. 24) and sentenced to imprisonment for four years and to pay a fine of $1,000 (R. 25). On an appeal raising, *inter alia,* the same questions as are presented by the petition here, the conviction was affirmed (R. 100).

The facts in support of the conviction may be briefly summarized as follows:

Operating under a Michigan statute, set out in the margin,[1] providing for a so-called one-man

[1] Sections 17217 and 17218 of the Compiled Laws of Michigan for 1929 (Michigan Statutes Annotated, Sections 28.943 and 28.944) provide:

"28.943 Proceedings before trial; investigation of suspected offenses by judge or justice; summoning witnesses, inquiry, compensation. Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and

grand jury, an investigation was in progress in Ingham County, Michigan, in 1945 and 1946 with respect to improper influences leading to the earlier passage of certain banking statutes by the state legislature (R. 33–34). Around October 1, 1945, the duties of one-man grand juror for that investigation were assumed by Judge Louis E. Coash, a Circuit Judge for Ingham County (R. 33). Judge Coash testified below that in

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belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

"28.944. Same; apprehension of suspected person; removal of public officers, procedure; disclosure of statement. Sec. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable

connection with this investigation, petitioner, then a member of the Michigan Bar (R. 37),[2] appeared before him as a witness several times (R. 34, 40) and was granted immunity by him (R. 34, 38–39, 48, 52, 53–54). On April 25, 1946, a subpoena was served on petitioner requiring him to appear before Judge Coash, in his capacity as a one-man grand jury, "from day to day, and at such other times as the Court may order" to testify in a certain cause entitled "in the matter of the complaint of Herbert J. Rushton, Attorney General for the State of Michigan, for a judicial investigation concerning certain criminal offenses" (R. 37, 40–42). That subpoena was

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cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

[2] Petitioner resigned from the Michigan Bar on May 7, 1946 (R. 37, 48–49).

still in force when petitioner left Michigan in August 1946 (R. 37).

On July 20, 1946, Judge Coash, acting under the one-man grand jury statute, issued a warrant of arrest for 24 of 28 persons named therein as having unlawfully conspired among themselves and with other unknown persons—

> * * * to obstruct the due course of legislation and wilfully and corruptly to affect and influence the action of the Legislature of the State of Michigan, the Senate, the House of Representatives, divers members thereof, and the Assistant Attorney General assigned to act as the Legal Advisor to the Governor of the State of Michigan, and the Governor of the State of Michigan, in the consideration of and action on certain proposed legislative measures then and there pending in and before said Legislature, Senate, and House of Representatives, and Governor of the State of Michigan, and which might by law be and was brought before the said Assistant Attorney General in his public capacity, to-wit, Senate Bill Number One of the sixty-first Michigan Legislature, regular session of 1941, entitled; * * * and divers other measures and bills then and there pending in and before said Legislature, the Senate, and the House of Representatives and Governor of the State of Michigan, and which by law might be brought before the said Assistant Attorney

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> General in his public capacity by then and there offering, tendering, promising, giving and receiving bribes, money, and other things of value; and by the actual giving and receiving of the same; and by the wilful, unlawful, malicious, corrupt, and felonious employment for money and other things of value of said Assistant Attorney General as attorney and agent for themselves, the aforesaid conspirators and the Michigan National Bank, a private National Banking Corporation, to aid and assist in defeating said proposed legislation by representations, opinions, statements and arguments unfavorable thereto, to the Legislature of the State of Michigan, its committees and members, and to the Governor of the State of Michigan, contrary to, and in abuse of, the powers of the aforesaid public office, and in corruption of the aforesaid public office, and in misconduct in the aforesaid office and in relation to the duties of said office, * * *. (R. 6–7.)

The warrant specified by name various of the conspirators who were members of the state legislature or officials of the state or who gave or offered bribes. Petitioner was named as one of the conspirators who had offered bribes, but the warrant did not direct that he be arrested.[3]

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[3] Apparently petitioner was not named as a defendant because of the immunity that had been given him for testifying before Judge Coash and because he was needed as a prosecution witness.

Following the issuance of the warrant, all of the defendants named therein were notified to appear for arraignment on or before July 23, 1946, and, after several delays, all but one (who was arraigned subsequently) appeared for arraignment by August 15, 1946 (R. 36). After several continuances, September 10, 1946, was set as the date for their preliminary examination before Chester O'Hara, a Circuit Judge for Wayne County, Michigan, to determine whether they should be bound over to the circuit court for trial (R. 37, 39, 50, 55).

Petitioner was advised that he would be needed as a witness at the preliminary examination before Judge O'Hara (R. 56–57). However, he stated that "he would not testify unless he had to" (R. 45, 48, 64). Judge Coash testified that petitioner told him that the principal reason he did not want to testify was because he had been taken off the grand jury payroll, from which he had been receiving $600 a month, and told that in the future he would only receive regular statutory witness fees (R. 45–46). Petitioner consulted an attorney to determine whether the immunity previously granted him could be revoked and whether the Michigan authorities could compel his removal from the District of Columbia (R. 60–61). Then, in the latter part of August 1946, petitioner left Michigan and went to Washington, D. C. (R. 58–59); this action on his part precluded service of a subpoena upon him to ap-

pear at the September 10th hearing (R. 66). Early in September, certain Michigan prosecuting officials went to Washington and talked to petitioner about returning for the September 10 hearing, but he told them he would not return and be a witness at that hearing (R. 59–60, 61–62). Petitioner was not present when called to testify at the hearing (R. 62).

ARGUMENT

1. (a) The unsoundness of petitioner's challenge (Pet. 21–26) of the power of Congress to enact the fugitive witness provision of the Fugitive Felon Act is apparent when the statute is considered in the light of its legislative and judicial background.

The Fugitive Felon Act is one of a series of so-called crime laws enacted by the 73d Congress (1934), many of which, like that act, were designed to implement state law enforcement where immoral or other wrongful activity is, practically speaking, beyond the physical reach of the several states. See historic materials in *Crime Laws of the 73d Congress,* Government Printing Office, Wash., 1934. Among the more important statutes thus adopted were the National Stolen Property Act (18 U. S. C. 413 et seq.), the Anti-Racketeering statute (18 U. S. C. 420 (a)–(e)) and the statute here involved. These statutes followed a pattern which had already been well established by the enactment of federal legisla-

tion in aid of the states excluding diseased cattle (21 U. S. C. 115) and impure foods and drugs (21 U. S. C. 301–392) from interstate commerce; for the suppression of the lottery traffic (18 U. S. C. 387); and prohibiting the interstate transportation of stolen vehicles (18 U. S. C. 408), of women for immoral purposes (18 U. S. C. 397–404), or of kidnapped persons (18 U. S. C. 408a).

The constitutionality of such legislation under the commerce clause is firmly established. See *Brooks* v. *United States,* 267 U. S. 432, 436–437, and cases cited. In the light of the decisions of this Court, we think it is clear that Congress was well within its authority in prohibiting travel in interstate commerce to avoid giving testimony in a state criminal proceeding. See *Congressional Power to Restrain Interstate Flight of Witnesses in Criminal Cases,* IV Detroit Law Rev. (June 1934) 133–142; *The Problem of Fugitive Felons and Witnesses,* I Law and Contemporary Problems (October 1934) 415. The validity of the corollary provision prohibiting such travel to avoid prosecution for certain specified crimes has been sustained by several lower courts. *United States* v. *Miller,* 17 F. Supp. 65 (W. D. Ky.); *Simmons* v. *Zerbst,* 18 F. Supp. 929 (N. D. Ga.); see also *Barrow* v. *Owen,* 89 F. 2d 476, 478 (C. C. A. 5).

(b) Nor is the fugitive witness provision void for indefiniteness or uncertainty (see Pet. 45–50). The fact that it does not, like the provision dealing

with fugitive felons, enumerate any crimes upon which the proscription hinges is of no moment, for in any particular case state law will furnish an adequate guide. And in view of the broad purpose of the provision—to prevent the thwarting of state criminal justice by fugitive witnesses—it cannot be said that such an adoption of state law is an unreasonable federal legislative device. As a matter of fact, this Court, in *Jerome* v. *United States,* 318 U. S. 101, 104, 106, specifically citing, *inter alia,* the Fugitive Felon Act as an example, pointed out that Congress may and often does make the application of a federal statute dependent on state law. While it may be that the precise application of state law may at times be difficult of ascertainment—as petitioner suggests (Pet. 35–38) by his alleged difficulties in determining whether the charges in the warrant issued by Judge Coash constituted a felony under the law of Michigan—the consequences of any doubt on that score in a particular case are obviated in view of the requirement of the federal act that the accused must have left the state where a felony is charged "with intent" to avoid giving testimony in the state proceedings. As the court below properly noted, quoting from the opinion of this Court in *Screws* v. *United States,* 325 U. S. 91, 101, "* * * the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague

or indefinite statute invalid." Indeed, in the instant case it is clear from the evidence set forth in the Statement, particularly the terms of the warrant and the character of the offenses investigated by the one-man grand jury, that petitioner could not have labored under any misapprehension that the state proceedings did not involve felony charges. Cf. *United States* v. *Wurzbach,* 280 U. S. 396, 399; *Horning* v. *District of Columbia,* 254 U. S. 135, 137; *McGunnigal* v. *United States,* 151 F. 2d 162, 165–166 (C. C. A. 1), certiorari denied, 326 U. S. 776. In short, petitioner's assertion that he could not have foreseen that his conduct would be proscribed by the terms of the statute is no more than an *ex post facto* attempt to justify a wilful failure to heed the clear signs of danger apparent to him when he left Michigan.

(c) Petitioner's contention (Pet. 10–11, 25) that the Fugitive Felon Act violates the constitutional guaranty, under Article IV, Section 2, of free ingress and egress among the states is frivolous. That provision is a limitation on the states; it does not limit the federal government in the exercise of its powers under the commerce clause. See *United States* v. *Wheeler,* 254 U. S. 281, 299–300. As this Court said in *Hoke* v. *United States,* 227 U. S. 308, 320–321, in rejecting a similar contention, the right to move freely among the states "exercised in morality [cannot] sustain a right to be exercised in immorality."

(d) Petitioner also asserts (Pet. 25) that the statute is incompatible with the extradition clause of Article IV, Section 2, of the Constitution. However, the right granted to each of the states to demand the surrender from sister states of fugitive criminals does not limit the authority of the federal government under the commerce clause. Nor does the statute interfere with the states' right of extradition (see opinion below at R. 118). Moreover, the extradition clause in terms applies only to fugitives charged with crime and offers no remedy whatsoever in the case of fugitive witnesses.[4]

2. Petitioner's contention that the evidence does not establish an offense within the terms of the fugitive witness provision is as untenable as his contention that the statute is unconstitutional.

(a) He argues that when he left Michigan there was no "criminal proceeding" then pending there because the defendants named in the warrant issued by the one-man grand jury had not yet been given a preliminary hearing to determine whether they should be bound over for trial, and because no criminal case had yet been docketed by the clerk of the Circuit Court for Ingham County

[4] The claim that the sentence authorized by the statute for fugitive witnesses and the sentence actually imposed upon petitioner constitute cruel and unusual punishment (Pet. 14, 25–26) is, as the court below held (R. 115–116), without merit, because (1) the Eighth Amendment was adopted to prevent inhuman or barbarous punishment, and (2) the sentence imposed was within the statutory limits.

(Pet. 50–56). However, petitioner mistakenly assumes that the statutory proscription applies only where the accused flees to avoid testifying in a pending state criminal proceeding. There is nothing in the language of the statute or its legislative history to support such an assumption. On the contrary, since the obvious purpose of the statute is to discourage witnesses from defeating state justice by leaving state jurisdiction before the resolution of criminal charges, it must have been intended to apply whether or not state criminal proceedings had actually commenced, so long as the witness knew such proceedings were imminent. Otherwise witnesses could defeat state justice, after having learned state proceedings were to be commenced, by fleeing before the state machinery could become operative. Patently, the evil against which the statute is aimed is as serious in the one case as in the other.

But, assuming, *arguendo,* that the fugitive witness provision applies only where state criminal proceedings were pending when the witness left the state, we submit, as the court below fully and properly demonstrated (R. 111–114), that the Michigan proceedings had unquestionably advanced to such a stage that they were "criminal proceedings" then pending, for after full investigation, initiated upon the complaint of the State Attorney General and in which petitioner was under a continuing subpoena, a warrant of arrest constituting a charge of crime had been issued

by the one-man grand jury, the defendants had been arraigned and given bond, and the matter had been set for preliminary hearing to determine whether they should be bound over for trial. The fact that the case may not have been docketed by the court clerk is obviously of no importance, because, as the clerk's testimony shows (R. 72–74), his practice was not to docket criminal cases until an accused was bound over for trial (R. 74). As a matter of fact, certain of the documents relating to the one-man grand jury investigation had been recorded in his office (R. 73; see also R. 76).

(b) Petitioner's contention that no "felony" was charged in the Michigan proceedings is based upon the subsidiary arguments that at common law there is no such conspiracy offense as was charged in the warrant (Pet. 26–35); that in any event the Michigan statute providing that indictable offenses at common law for which no punishment is expressly provided by statute shall be deemed felonies punishable by imprisonment or fine (see fn. 5, p. 18, *infra*), on which the Michigan proceedings were based, is unconstitutional for indefiniteness (Pet. 35–38); and that there could be no offense of conspiracy here because the substantive offense of bribery upon which the conspiracy charge hinged requires a plurality and concert of parties (Pet. 38–45). These arguments obscure the real test of criminal responsibility under the fugitive witness provi-

sion of the federal statute. The plain language of that statute, referring to state criminal proceedings in which the commission of a felony is "charged," construed in the light of the purpose of aiding state justice by discouraging the flight of witnesses, makes it apparent that the statute applies to any fugitive witness whose testimony is desired in a proceeding purportedly charging the commission of a felony under the laws of the state. The federal offense, by reason of its nature, would normally precede resolution of the state charges, and final determination of the state charges may never actually eventuate. Questions as to the legal sufficiency of the state charges to constitute a felony under state law, the regularity of the state proceedings, the guilt or innocence of the accused, or even as to the constitutionality of the state criminal law involved in the proceedings, are questions for determination, in the first instance at least, by the state courts in the state proceeding; they are irrelevant in a prosecution under the federal statute for fleeing to avoid giving testimony in the state proceedings. For the purposes of the instant prosecution, it was sufficient that in the state proceedings the state purported to charge the defendants with the commission of a felony. The objections posed by petitioner to the validity of the state proceedings are matters for the state courts to decide in that proceeding in the event they are raised.

In any event, it is clear that in the Michigan proceedings a felony was charged under a valid statute. Petitioner's attack upon the validity of the state statute,[5] based on the asserted difficulty of determining what are indictable offenses at common law and therefore felonies under the statute (Pet. 35–38), must fail for similar reasons as his argument that the federal statute is uncertain (see pp. 11–13, *supra*). Additionally, petitioner overlooks the obvious historical fact that under Anglo-Saxon law most crimes were originally proscribed and defined by common law, rather than by statute (see Michael and Wechsler, *Criminal Law and Administration* (1940), p. 1284), and that the common law of crimes originally transplanted to the several states was not succeeded by or interwoven with statutes and codes until later in the history of this country under the very Constitution which petitioner seeks to invoke against the Michigan statute. See, e. g., *United States* v. *Worrall,* 2 Dallas 384, 393–394; Wharton, *American Criminal Law* (5th Ed. 1861),

[5] Section 28.773 of the Michigan Statutes Annotated provides:

"Same; indictable common-law offenses. Sec. 505. Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five (5) years or by a fine of not more than two thousand five hundred (2,500) dollars.

c. 1; Clark and Marshall, *Crimes* (4th Ed., Kearney), §§ 8–17.

Nor can there be any serious question that the conduct charged in the state proceedings constituted a common law crime which, by virtue of the Michigan statute, was a felony. In this connection, petitioner discursively analyzes historical common law precedents at large and concludes that a conspiracy of the character charged was not an offense at common law (see Pet. 26–32). However, the error of petitioner's approach lies in the fallacious assumption that the federal statute requires reference to the general common law, rather than to the common law of Michigan. Since the federal offense is predicated on flight to defeat state justice, it seems obvious that the law of the particular state from which the flight occurs is exclusively controlling on the issue whether a felony was charged. Indeed, the language of the fugitive witness provisions confirms this, for it predicates federal liability on fleeing to avoid testifying in any criminal proceedings "in such place in which the commission of a felony is charged." As we have previously noted (*supra*, p. 12), this Court in the *Jerome* case specifically indicated that this statute was a typical example of congressional intention to adopt for federal purposes the law of particular states.[8] Congress

[8] For the reasons stated in the text, the case of *United States* v. *Brandenburg*, 144 F. 2d 656 (C. C. A. 3), does not support petitioner's assumption that we must look to the

must have been aware that most states have so codified their criminal law or intertwined it with their own common law that reference to general common law would be meaningless for the purposes of this statute. Indeed, in such circumstances, contrary to petitioner's thesis in his attack upon the Michigan statute, reference to general common law rather than to the law of Michigan creates rather than reduces uncertainty.

Accordingly, it seems clear that whether a felony was charged in the Michigan proceedings is a matter to be determined solely by reference to Michigan law, of which the Michigan courts are the final arbiters. The persuasive analysis in the opinion below demonstrates that, under the Michigan decisions, such a conspiracy as was charged in the warrant issued by the one-man grand jury is a crime which, since the enactment of the Michigan statute in 1927, is a felony (R. 107–108); and that the offenses which were the objects of the conspiracy were of such scope, not being confined merely to bribery, that agreement

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general common law, rather than the common law of Michigan, to determine whether under Michigan law a felony was charged (see Pet. 24–25, 48). Moreover, the *Brandenburg* case, which we think is wrong in principle in so far as it holds that the offenses listed in the fugitive felon provision of the federal statute are to be construed in terms of general common law or federal law rather than by reference to the particular state law, is distinguishable because the fugitive felon provision does not, as does the fugitive witness provision, so clearly in terms adopt the particular state law.

or combination was not a necessary element of these objective offenses. The conspiracy to commit these offenses was therefore separately indictable. (R. 107, 109–111.)

CONCLUSION

For the reasons stated above, the judgment below is correct and there is no conflict of decisions. The case does not present any serious or substantial questions as to the constitutionality of the fugitive witness provision of the Fugitive Felon Act or as to its application to the facts here. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

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IN THE

Supreme Court of the United States

No. 299

CHARLES F. HEMANS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR RECONSIDERATION OF ORDER ENTERED OCTOBER 20, 1947, DENYING ALLOWANCE OF WRIT OF CERTIORARI.

This petition for rehearing is filed under Rule 33 of this Court and is based on the following grounds:

I.

The witness provision in Title 18, Section 408(e)(2), U. S. Code, is not complete in itself and can not become applicable unless a "felony" be charged in the proceeding wherein the testimony of the witness is desired.

(a) The State statute on which the State proceeding is based (quoted main brief, p. 27) shows on its face that it is indefinite and uncertain. Therefore, it is in conflict with the XIVth Amendment of the Fed-

eral Constitution, and the conviction of the petitioner is in violation of the Vth Amendment.

(Compare Federal cases cited on page 38 of the main brief and State cases cited on pages 36-37 thereof.)

(b) Interpreting the State warrant—constituting the basis of the proceeding wherein petitioner is wanted as a witness—the Supreme Court of Michigan in its opinion filed October 13, 1947, stated that the State proceeding is one *"wherein the defendants herein were charged with the criminal offense of common law conspiracy to wilfully, wrongfully and unlawfully obstruct the due course of legislation, and to wilfully and corruptly affect and influence the action of the Michigan legislature."* (Supplemental Br. 5). (Italics mine).

There was no such crime at common law as that charged in these Michigan State proceedings.

Examination of the monumental *History of the English Law* by Holdsworth, as well as the less exhaustive works of the late Mr. Justice Holmes on *The Common Law* and Wright *On Criminal Conspiracies* with Carson's American Notes (1896 ed.), cited in petitioner's main brief, is amply sufficient to show that there were and are no such Common Law Crimes of Conspiracy (a) to wilfully, wrongfully and unlawfully obstruct the due course of legislation or (b) to wilfully and corruptly influence the action of a legislative body. (See Main Brief, pp. 27-31.)

There is no common law crime in Michigan independently of the English Common Law. In the early *Lamphere case*, 61 Mich. 105, the Supreme Court of Michigan stated:

> "Michigan was never a common law colony, and that while we have recognized the common law as adapted to our jurisprudence, it is the English Common Law unaffected by statute."[1]

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[1] Statutory common law crimes had been abolished in Michigan by Territorial Act of September 16, 1810. (Vol. 1, Laws, Territory of Michigan, pp. 900 et seq.).

Also, the Supreme Court of Michigan *In Re Lambrecht*, 137 Mich. 450 said:

> "We can look only to the statute for any crime punishable in this State. We look to the common law for definition and principle in our criminal jurisprudence, but unless the statute provides a penalty, acts criminal at common law are not crimes in the State."

This State of Michigan statute (Section 28.773 Annotated Code) purports to make a "felony" of any "indictable offense at the common law," whether a felony or a misdemeanor, for the punishment of which no provision is expressly made by any other statute of the State. A fair reading of the said statute is that if there be any offense indictable at the common law, either as a felony or misdemeanor, and there is no punishment for such offense provided in any other State statute, such offense is a "felony" and punishable as provided in the said State statute.[2]

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[2] The legislative ancestor of this section, 28.773 Michigan Statute Annotated, came into being in the Territorial Act of November 4, 1815 (Vol. 1, 109 Cass Code of Michigan Territorial Laws). It was revised and reenacted in the Territorial Act of May 17, 1820 in Sec. 62 (Vol. 1, Michigan Code of Territorial Laws of 1820, pp. 561, 588); Section 7 of Act 39, Michigan Laws of 1840; Section 22, Chap. 161, Revised Statutes of Michigan 1846, which remained in effect until 1927; Sec. 15, Chap. IX, Act No. 175, Michigan Acts of 1927; and then this Section 505 of Act 328, Michigan Statutes, 1931. None of the legislative ancestors of Section 505, except the one of 1927, specifically made a conspiracy a crime. Section 22 of the cited 1846 Michigan Revised Statutes, which was longest in effect and adopted before the Due Process Clauses of the Michigan Constitution of 1850 (for the first time) and before the Fourteenth Amendment to the Federal Constitution, provided:

> "Every person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be punished by imprisonment in the county jail for not more than two years, or by fine not exceeding two thousand dollars, in the discretion of the court."

This statute here quoted was in effect when ~~the opinion of~~ the Supreme Court of Michigan rendered its opinion in the above cited case of *In Re Lambrecht*.

Thus to arrive at what may be a common law crime in Michigan, for which a penalty is not provided in some other specific statute than the general section on which this State proceeding is based, one must first determine whether there is any such common law crime as charged in this warrant, then perform a surgical operation thereon, if it had been affected by any Parliamentary statute at the time of the Revolutionary War or at some other period prior thereto, and then determine from the voluminous statutes of Michigan whether there is some specific statute among them which fixes a penalty for such common law crime. This is an impossible task for the layman and next to impossible for even judges and lawyers.

It is right here that this State statute runs afoul of the XIVth Amendment to the Federal Constitution, because of indefinieness and uncertainty, and for reasons which this Court has so well stated in the *Screws case,* 325 U. S. 91, that to attempt to improve on them would be equal to an attempt to gild the lily.

Moreover, the Supreme Court of Michigan has stated in *People* v. *Goulding,* 275 Mich. 353, 358-359 on this point of necessary definiteness and certainty in its State criminal statutes, that:

> "Statutes defining crimes are to be strictly construed. They must prescribe with reasonable certainty the elements of the offense. 12 C.J. p. 1203. They ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Brewster,* 139 U. S. 278; *Commonwealth* v. *Atlas,* 244 Mass. 78; *United States* v. *Sharp,* 27 Fed. Cas. 1041. The legislature must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain rule of conduct. 8 R.C.L. p. 58.
>
> "Criminal Statutes must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal. *Brown* v. *State,* 137 Wis. 543.

"It is a well settled rule of law that no one can be punished for doing an act unless it clearly appears the act sought to be punished comes clearly within both the spirit and the letter of the law prohibiting it. *State of Oregon* v. *Mann*, 2 Ore. 238.

"No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. *Tozer* v. *United States*, 52 Fed. 917; *Chicago & N. W. R. Co.* v. *Dey*, 35 Fed. 866; *Railroad Commission of Indiana* v. *Railroad Co.*, 179 Ind. 255."[3]

II.

The State statute being void on its face because in conflict with the XIVth Amendment, the petitioner availed himself of the only means available to test the same.

This Court has repeatedly stated, in effect, that an unconstitutional statute is void and is as no law.

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[3] A few of the many other cases to the same effect are *Herndon* v. *Lowry*, 301 U. S. 242; *Smith* v. *Cahoon*, 283 U. S. 552; *Stromberg* v. *California*, 283 U. S. 359; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Weeds* v. *United States*, 255 U. S. 109; *American Seeding Co.* v. *Kentucky*, 236 U. S. 660; *Stoutenburgh* v. *Frazier*, 16 App. D. C. 229; *Carter* v. *State*, 243 Ala. 575; *Standard Oil Co.* v. *State*, 178 Ala. 400; *Ex parte Peppers*, 189 Calif. 581; *Phillips* v. *State*, 60 Ga. 622; *State* v. *Burns*, 53 Idaho, 418; *Mayhew* v. *Nelson*, 346 Ill. 381; *People ex rel Travis* v. *Rogier*, 326 Ill. 310; *Stone* v. *State*, 220 Ind. 165; *Glendale Coal Co.* v. *Douglas*, 193 Ind. 73; *State* v. *Blaser*, 138 Kans. 447; *State* v. *Satterlee*, 110 Kans. 84; *State* v. *Crawford*, 104 Kans. 141; *Sullivan* v. *Brawner*, 237 Ky. 730; *Louisville & N. R. R.* v. *Commonwealth*, 99 Ky. 132; *Daniel Loughran Co., Inc.*, v. *Maryland*, 178 Md. 38; *Anderson* v. *Burnquist*, 216 Minn. 101; *State ex rel Crow* v. *West Side St. Ry. Co.*, 146 Mo. 155; *State* v. *Excelsior, etc. Co.*, 212 Mo. 101; *H. Earl Cleck* v. *Commission*, 94 Mont. 488; *State ex rel English* v. *Ruback*, 135 Nebr. 335; *State* v. *Klapprott*, 127 N. J. L. 395; *State* v. *Diamond*, 27 N. M. 477; *People* v. *O'Gorman*, 274 N. Y. 284; *State* v. *Partlow*, 91 N. C. 550; *Missel* v. *State*, 33 Okla. Cr. 376; *Commonwealth* v. *Zasloff*, 338 Pa. 457; *State* v. *Standard Oil Co.*, 195 S. C. 267; *Lone Star Gas Co.* v. *Kelley*, 140 Tex. 15; *State* v. *Powles & Co.*, 90 Was. 112; *State ex rel Hickey* v. *Levitan*, 190 Wis. 646.

Little Rock & F. S. R. Co. v. *Worthen,* 120 U. S. 97;
Norton v. *Shelby County,* 118 U. S. 425;
United States v. *Realty Co.,* 163 U. S. 427;
Chicago I. & L. R. Co. v. *Hackett,* 228 U. S. 559;
Ex Parte Royall, 117 U. S. 734.

The trial court instructed the jury as a matter of law that a felony is charged in these State proceedings (R. 19). The Circuit Court of Appeals affirmed. In view of the unconstitutionality on its face of the State statute on which the State proceedings are based, this charge in itself amounted to a denial in the Federal court of due process of law under the Vth Amendment.

Escoe v. *Zerbst,* 295 U. S. 490, 494;
Sunal v. *Karge,* 331 U. S. 91; U. S. Law ed. 1555.

Moreover, the trial court and the Circuit Court of Appeals completely ignored the fact that the State proceedings charged a conspiracy existing from January 1, 1941, to March 1, 1944, concerning a certain named bill and divers other bills and persons. The so-called grant of immunity related to a period from January 1, 1941, to December 31, 1941, and to one certain bill and a certain named person. There is nothing whatever in this grant of immunity, even if valid, which protects the defendant from self-incrimination for the balance of the period from January 1, 1942 to March 1, 1944, named in the warrant and concerning the "other bills" not specifically named. Under both the XIVth Amendment and the Michigan Constitution the petitioner could not be required by the State courts to incriminate himself for such subsequent period of time. Both the Vth and the XIVth Amendments are to be liberally construed to prevent impairment of the safeguards which they respectively provide. See *Gould* v. *United States,* 255 U. S. 298, 304, wherein it was stated:

> "It has been repeatedly decided that these two Amendments [IVth and Vth] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured

by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

The petitioner is not now attempting to secure correction by means of habeas corpus, as was the situation in this Court in *Sunal* v. *Karge, supra.* Petitioner sought correction by direct appeal to the Circuit Court of Appeals and that court refusing to make the correction, the case is here on petition for certiorari.

Attention is invited to the fact that the petitioner previously attempted in his habeas corpus proceedings to prevent his removal to Michigan to raise the issue of a lack of legal basis for this prosecution. Mr. Justice Burton heard the application on September 27 and 28, 1946, for an order staying the execution of the warrant of removal until counsel for petitioner could prepare and file in this Court an authenticated copy of the records in the Federal courts of the District of Columbia, so that this Court could then inquire into the legality of the petitioner's detention.

By an order entered at that time, Mr. Justice Burton denied the application, stating, among other things, that:

> "Having given full consideration to the foregoing proceedings and to the policy of Congress and of this Court as to the purpose of removal proceedings in the federal courts and, especially as to the proper time when, and place in which, consideration shall be given to the sufficiency of an indictment and to the validity of a statute upon which an indictment shall depend, together with any justification for the granting of a stay of execution so that such proceedings may be prepared, filed and considered in the Supreme Court of the United States before the warrant of removal shall be permitted to take effect, the foregoing motion is denied."

This Court has held that any person injured by a statute may raise the question of its invalidity.

Weaver v. *Palmer Brs. Co.,* 270 U. S. 402;
Coe v. *Armour Fertilizer Works,* 237 U. S. 413;
Massachusetts v. *Mellon,* 262 U. S. 447.

Since this indictment was filed, the petitioner has succeeded in sustaining in the Supreme Court of Michigan his position before the examining magistrate that he was then being called upon to incriminate himself in this Federal proceeding in violation of his constitutional safeguards. The opinion of the Supreme Court of Michigan to that effect is now before this Court as Exhibit "D" to petitioner's supplemental brief. True it is that the almost certainty of self-incrimination in the Federal proceedings arose after—and because of—this indictment in the Federal court, but the attempt of the State prosecution to compel petitioner to incriminate himself is illuminating and might have succeeded but for the State courts.

There yet remains the attempt of the State prosecuting authoritites, with the aid of the Federal government, to compel the petitioner to incriminate himself in the State proceedings, in violation of his rights under the XIVth Amendment, because the so-called immunity order shows on its face that it covers but a fraction of the period of time that the warrant charges the conspiracy to have existed and in which petitioner is charged by the warrant to have been a co-conspirator. Compare *People* v. *Norwood & Hardiman,* 312 Mich. 266. In that case, the defendants Norwood, Hardiman and others were convicted in 1940 under an amended information containing three counts, each of which charged the defendants with the common law offense of conspiracy to violate certain gambling laws of the State. On motion the convictions were set aside and a new trial granted. On a retrial in 1942 they were again convicted and appealed.

The information charged that the defendants "on June 1, 1933, and on divers other days and dates up to and including May 29, 1940" conspired to violate certain gambling laws of the State. During the first trial it developed that on December 6, 1939 the defendants Norwood and Hardiman had testified and had been granted immunity in the grand jury proceedings involving graft and corruption in

Wayne County. Thereupon the information was then amended by changing the conspiracy period as December 7, 1939 to May 29, 1940. It later developed that Norwood and Hardiman had again testified before the grand jury on April 24, 1940, and again had been granted immunity. Thereupon the information was again amended to change the conspiracy period as April 25 to May 29, 1940. On the second trial a motion was denied to quash the information as to the defendants Norwood and Hardiman because of the immunity granted them in the grand jury proceedings.

Upon appeal defendants Norwood and Hardiman contended that the immunity granted in the grand jury proceedings extended through the full period of the conspiracies charged in the amended information and that, therefore, the information should have been quashed as to them.

The Supreme Court of Michigan in overruling such contention stated that:

> "Defendants Walter Norwood and Harold Hardiman contend that the immunity granted them in the pending grand-jury proceedings extended through the full period of the conspiracies charged in the amended information and, therefore, that the information should have been quashed as to them. The statute, 3 Comp. Laws 1929, § 17220, (Stat. Ann. § 28.946), under which immunity had been granted, provides:
>
> " 'No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted *for any offense concerning which such* answers may have tended to incriminate him.'
>
> "As hereinbefore mentioned, the information had been amended during the first trial to change the conspiracy period as April 25 to May 29, 1940. Norwood

and Hardiman claim that they also testified before the grand jury June 19 and 20, 1940. Relative to the immunity granted them, the court said in the present trial:

"'Let me state, * * * for the benefit of the record, that in the last trial * * * both Norwood and Hardiman had been questioned by the grand jury in April, 1940, and * * * Judge Ferguson said that this immunity * * * [was] extended up to and through April 24, 1940. So * * * the information was amended, so that the initial date of the conspiracy was named as April 25, 1940. Later * * * it transpired, by certain testimony that was given, that * * * Hardiman and Norwood, again testified before the grand jury some time in June (1940). * * * That matter was again taken up with Judge Ferguson and * * * (he) said that the immunity did not extend to June * * * when they were again before the grand jury. * * *

"'When I charge the jury, I will charge that immunity was given by Judge Ferguson to both these defendants * * * through April 24th.'

"[4, 5] These two defendants testified before the grand jury under grants of immunity, and under the statute they could not thereafter be prosecuted for any offense concerning which their answers before the grand jury might have 'tended to incriminate' them. However, there was no claim or showing that their answers before the grand jury would have incriminated them of the subsequently committed conspiracies to violate the gambling laws charged in the present case. The mere fact that they testified before the grand jury does not establish that their testimony would have tended so to incriminate them. *The grants of immunity would not protect them from prosecution for offenses about which they were not questioned before the grand jury.* In the present trial they could have called the grand juror or his stenographer and shown whether or not their answers before the grand jury would have 'tended to incriminate' them of the conspiracies charged. People v. McCrea, 303 Mich. 213, 245, 246, 6 N. W. 2d 489; People v. O'Neill, 107 Mich. 556, 65 N. W. 540.

"Furthermore, the testimony of Norwood and Hardiman before the grand jury could relate only to past

offenses, and, therefore, could not incriminate them of future offenses. The immunity granted them on December 6, 1939, and April 24, 1940, did not protect them from the subsequently committed conspiracies charged in the amended information. In People v. Woodson, 309 Mich. 391, 397, 15 N. W. 2d 679, 681, 157 A. L. R. 419, we said:

"'The immunity statute expressly protects a witness against prosecution for any offense, concerning which his answers may tend to incriminate him, *but it does not protect him from any offense subsequently committed.*'" (Italics mine.)

But above and beyond all this, as serious as it is, the petitioner has been indicted and convicted in a Federal court for refusing to testify in a State proceeding which State proceeding has no basis whatever in law because the State statute on which the warrant is based is itself contrary to the XIVth Amendment to the Constitution of the United States, by reason of its indefiniteness and uncertainty, and further because, in fact, no such crimes as are charged in the warrant existed in the English Common Law—the only common law, shorn of Parliamentary statutory accretions, which exists in Michigan.

If a single individual in the United States, however unworthy he may be, may be indicted, convicted and imprisoned to serve a long term in the penitentiary, any other one of the 130,000,000-odd persons in the United States may be similarly denied his constitutional rights.

We believe that to have been done in the instance of the petitioner.

III.

The Federal statute has not been correctly interpreted by the courts below.

This Title 18, Section 408(e), U. S. Code, is known as the Fugitive Felon Act and has a double purpose. Subsection 1 thereof is directed to the interstate travel of persons to avoid prosecution for certain specific crimes, as

enumerated therein. Section 2, if it be constitutional, is directed at witnesses who flee with intent to avoid giving testimony in proceedings in which a "felony" is charged.

It is urged that the word "felony" in subsection 2 should be interpreted to mean the crimes enumerated in subsection 1 of the same statute, or at least the same type of crimes of gangster violence as those enumerated. These prosecutions for such specific crimes might be in either Federal or State courts. We can find nothing indicating that subsection 2 was intended to punish fleeing witnesses to avoid testifying in State conspiracy cases, such as are charged in this warrant, and particularly when the fleeing defendants could not be punished under subsection 1 of the same statute.

To give subsection 2 the interpretation given it by the courts below means that a witness may be immobilized indefinitely within a State boundary, in the real or pretended hope of the prosecutor that the persons charged with substantive State crimes who may have fled the State might eventually be found within the State and brought to trial. It seems certain that no such result was within the intention of those of Congress concerned with the passage of the bill which became this Fugitive Felon Act. It is obvious, however, that such may be the result if the courts below be correct and subsection 2 of the Act be constitutional.

IV.

The Commerce Clause of the Constitution is not supreme over the balance of that document and its power over the travel of individuals is impliedly limited by the Xth Amendment and by the Privileges and Immunities Clause guaranteeing freedom of egress, ingress, and residence in the several States.

The Privileges and Immunities of the citizen, now protected by the Constitution, are older than the Constitution itself. The right to ingress, egress, and residence were privileges and immunities which the people of the United

States enjoyed prior to the formation of the union. One of the prime reasons for the Constitutional Convention of 1787 and the product thereof was the need for regulation of trade and commerce among the several states.

No serious consideration can be given to any legal argument to the effect that power exists under the Commerce Clause of the Constitution for the Federal Government to abridge and restrict the Privileges and Immunities Clause which the States may not do. The latter Clause does not extend to instances where some item of trade and traffic is involved which in itself constitutes an item of commerce.

Moreover, the existence of the Privileges and Immunities Clause and the Extradition Clause operates as an implied restriction on the scope of the Commerce Clause, so far as is concerned Federal restriction on travel of otherwise innocent and upright persons.

Such conclusion is sufficient to explain the prostitution, drug, lottery tickets, diseased live stock, stolen property, and other similar cases in this Court involving interstate travel, trade and intercourse.

But none of those cases appears to be in point and we submit that the analogy of those cases with the present one does not exist, particularly in view of Article IV, Section 2, of the Constitution of the United States and the Xth Amendment thereto. Not even though police could find that petitioner transported anything in interstate commerce. It required a jury to find from the conflicting evidence that petitioner had an *intent* to avoid testifying in a State case wherein the defendants were not charged with any crime within the terms of subsection 1 of Title 18, Section 408(e), U. S. Code.

CONCLUSION.

It is respectfully submitted that no more serious and far-reaching case has arisen in recent times than this one wherein a vast extension of Federal power is attempted over individual citizens, who must wage alone a struggle with the Federal and State governments. The right of

asylum from personal and political prosecutions is seriously affected, if not destroyed, and certainly destroyed as to those who may be indicted in a federal court as Fleeing witnesses, returned, and there released by Federal officials to State controls to testify in proceedings wherein State prosecuting officers are pleased to charge felonies.

It is further submitted that the case is of such great public importance as to overshadow its supreme importance to this petitioner and that the grave constitutional issues should be resolved by this Court.

Therefore, the Court is requested to reconsider its order of October 20, 1947, and allow the writ of certiorari in the case.

Respectfully submitted,

O. R. McGuire,
Attorney for Petitioner.

CERTIFICATE.

It is hereby certified by Counsel for the petitioner that the above petition for reconsideration is presented in good faith and not for purposes of delay.

O. R. McGuire.

November 3, 1947.